Public Prosecutor v Denish a/l Madhavan

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–72 OF 2005(J)
ARIFIN ZAKARIA CJ (MALAYA), AUGUSTINE PAUL AND ABDUL AZIZ MOHAMAD FCJJ
5 DECEMBER 2008

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Criminal Law — Dangerous drugs — Trafficking — Appeal by prosecution against substitution of offence of trafficking to offence of possession — Whether accused had knowledge of cannabis in his room — Whether others had access to house and accused's room — Dangerous Drugs Act 1952 ss 6, 39A, 39B

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Denish a/l Madhavan, the accused, was arrested during a raid by a party of customs officers of a rented house in Johor Bahru. At the time of the raid the accused was in his room with two other persons, who were to be witnesses for the prosecution. Upon gaining entry into the house the customs officers conducted a body search of the accused and the two others present and then a search of the room occupied by the party. During the search the officers found a plastic film case on the floor of the room, which was found to contain what was later proved to be 8.2685g of cannabis. After finding the film case the officer in charge of the raid administered to the accused the caution under s 37A of the Dangerous Drugs Act 1952 ('the Act'). The officer in charge then asked the accused the whereabouts of any other cannabis and although the accused was silent at first after repeated questioning he replied that it was under the bed. The accused then brought out three bags from under his bed and each bag was found to contain among other things a slab of what proved in total to be 3,121g of cannabis. The accused was then charged with trafficking in 3,121g of cannabis, a dangerous drug. The officers also found cannabis in the room adjoining the accused's room, which was occupied by one Ibrahim or 'Boy', but this was not the subject of the charge against the accused. The essential and basic finding of the trial judge was that the accused was in possession of the cannabis that was the subject of the charge, in that, he had custody or control of the cannabis with knowledge of what it was. The trial judge also used the evidence of the other two prosecution witnesses to establish that the house was a centre of drug-dispensing and drug-consuming activities and this in turn together with the accused's statement that the cannabis was under the bed reinforced his finding as to knowledge. Therefore, by reason of the amount he invoked the presumption under s 37(da) of the Act and held that the accused was guilty of trafficking in the cannabis. The accused's defence was that he had no knowledge of the

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presence of the cannabis in his room and that therefore in law he was not in possession of it. He sought to establish his defence by relying in or resorting to evidence to show that Boy was still in occupation of the other room and that another person had a set of keys and therefore access to the house and his room. The question of others having access to the accused's room was considered by the trial judge but after evaluating all the evidence the trial judge held that this evidence was not sufficient 'to negative the proof of exclusive possession'. The accused appealed to the Court of Appeal, which allowed the accused's appeal by setting aside the conviction and sentence for trafficking and substituting it with a conviction for the offence of possession of the cannabis. In arriving at this conclusion, the Court of Appeal held, inter alia, that exclusive possession had not been proven as there was a gap in the case for the prosecution that Boy and another had access to the house and the accused's room. This was the prosecution's appeal to confirm the conviction and sentence of the High Court.

Held, allowing the appeal and confirming the conviction and sentence of the High Court:

(1) The Court of Appeal did not at all deal with the trial judge's basic finding of possession, ie, of custody and knowledge and his reasons for that finding, especially for the finding as to knowledge (see para 23).

(2) The statement by the accused about the cannabis being under his bed was properly admitted and meant that the accused knew of the existence of the cannabis in the bags. The trial judge was therefore right in finding that the accused was in possession of the cannabis. Even if this statement by the accused was to be overlooked, the fact that the respondent brought out from under the bed the bags containing the cannabis was itself sufficient as complete and direct proof that he had knowledge of the existence of the cannabis in the bags and therefore was in possession of it. With such proof of knowledge the accused could not rely on the defence that the presence of the cannabis in the bags was unknown to him and the work of someone who had access to the house and the accused's room (see para 25).

[Bahasa Malaysia summary

Denish a/l Madhavan, tertuduh, ditahan semasa serbuan oleh satu pihak pegawai kastam di sebuah rumah sewa di Johor Bahru. Semasa serbuan tersebut tertuduh berada di biliknya dengan dua orang lagi, yang akan menjadi saksi pendakwaan. Setelah dapat masuk ke dalam rumah tersebut pegawai kastam melakukan pemeriksaan badan ke atas tertuduh dan dua yang lain dan kemudian pemeriksaan ke atas bilik yang didiami oleh mereka.

Semasa pemeriksaan itu pegawai menemui satu bekas filem plastik di lantai bilik tersebut, yang didapati mengandungi apa yang kemudiannya dibuktikan sebagai 8.2685g kanabis. Setelah menjumpai bekas filem tersebut pegawai yang bertanggungjawab ke atas serbuan tersebut membacakan amaran di bawah s 37A Akta Dadah Berbahaya 1952 ('Akta tersebut'). Pegawai bertugas kemudiannya menyoal tertuduh di mana kanabis yang lain dan walaupun tertuduh berdiam diri pada mulanya setelah ditanya berulang kali dia menjawab bahawa ia berada di bawah katil. Tertuduh kemudiannya membawa keluar tiga beg dari bawah katilnya dan setiap beg mengandungi antara lain satu kepingan tebal yang dibuktikan sebagai kanabis seberat 3,121g. Tertuduh kemudiannya dituduh mengedar kanabis seberat 3,121g, dadah berbahaya. Pegawai juga menemui kanabis di bilik bersebelahan bilik tertuduh, yang didiami oleh seorang bernama Ibrahim atau 'Boy', tetapi ia bukanlah perkara pertuduhan terhadap tertuduh. Perkara penting dan dasar dapatan hakim perbicaraan adalah tertuduh memiliki kanabis yang menjadi perkara pertuduhan tersebut, di mana, dia mempunyai penjagaan dan kawalan terhadap kanabis tersebut dengan pengetahuan tentangnya. Hakim perbicaran juga menggunakan keterangan dua saksi pendakwaan untuk membuktikan bahawa rumah tersebut adalah pusat pengeluaran dadah dan aktiviti penggunaan dadah dan ini bersama dengan kenyataan tertuduh bahawa kanabis tersebut berada di bawah katil menguatkan dapatannya berkenaan pengetahuan. Oleh itu, dengan alasan jumlah tersebut beliau menggunakan andaian di bawah s 37(da) Akta tersebut dan memutuskan tertuduh bersalah mengedar kanabis tersebut. Pembelaan tertuduh adalah bahawa dia tidak mengetahui tentang adanya kanabis di dalam biliknya dan oleh itu di dalam undang-undang dia tidak memilikinya. Dia memohon untuk membuktikan pembelaannya dengan merujuk kepada atau mengunakan keterangan bahawa Boy masih mendiami bilik yang satu lagi dan bahawa seoarang lagi mempunyai satu set kunci dan oleh itu boleh memasuki rumah dan biliknya. Persoalan mengenai orang lain mempunyai akses ke bilik tertuduh diambilkira oleh hakim perbicaraan tetapi setelah menilai semua keterangan hakim perbicaraan memutuskan bahawa keterangan ini tidak mencukupi untuk 'menidakkan bukti pemilikan eksklusif'. Tertuduh merayu kepada Mahkamah Rayuan, yang membenarkan rayuan tertuduh dengan mengenepikan sabitan dan hukuman untuk pengedaran dan menggantikannya dengan kesalahan memiliki kanabis. Dalam mencapai keputusan ini, Mahkamah Rayuan memutuskan, antara lain, bahawa pemilikan eksklusif tidak dibuktikan kerana terdapat jurang dalam kes pendakwaan bahawa Boy dan seorang lain mempunyai akses kepada rumah dan bilik tertuduh tersebut. Ini adalah rayuan pendakwaan untuk mengesahkan sabitan dan hukuman Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dan mengesahkan sabitan dan hukuman Mahkamah Tinggi:

(1) Mahkamah Rayuan tidak berurusan sama sekali dengan penemuan

dasar dapatan milikan oleh hakim perbicaraan, iaitu, berkenaan penjagaan dan pengetahuan dan alasannya berkenaan penemuan tersebut, terutamanya untuk dapatan berkenaan pengetahuan (lihat perenggan 23).

(2) Kenyataan oleh tertuduh mengenai kanabis di bawah katilnya dikemukakan secara betul dan bermakna bahawa tertuduh mengetahui kewujudan kanabis tersebut di dalam beg-beg itu. Hakim perbicaraan oleh itu betul dalam dapatan bahawa tertuduh memiliki kanabis tersebut. Walaupun jika kenyataan ini oleh tertuduh terlepas pandang, fakta bahawa responden membawa keluar daripada bawah katilnya beg-beg berisi kanabis adalah sendirinya mencukupi sebagai bukti yang lengkap dan langsung bahawa dia mempunyai pengetahuan tentang kewujudan kanabis di dalam beg-beg itu dan oleh itu memilikinya. Dengan bukti pengetahuan sedemikian tertuduh tidak boleh bergantung kepada pembelaan bahawa kewujudan kanabis di dalam beg-beg itu tidak diketahuinya dan ia adalah perbuatan seseorang yang mempunyai akses kepada rumah dan bilik tertuduh (lihat perenggan 25).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Chan Pean Leon v PP [1956] MLJ 237, HC (refd)
Leow Nghee Lim v Reg [1956] MLJ 28, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 37A, 37(da)(vi), 39A(2), 39B(1)(a), (2)

Appeal from: Criminal Appeal No J-05–97 of 2003 (Court of Appeal, Putrajaya)

Wong Chiang Kiat (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the respondent.

Abdul Aziz Mohamad FCJ (delivering judgment of the court):

[1] The respondent was convicted at the High Court at Johor Bahru of the offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') of trafficking in 3,121g of cannabis, a dangerous drug, and was sentenced to death under s 39B(2) of the Act. On his appeal, the Court of Appeal set aside

the conviction and sentence and substituted them with a conviction for the offence of possession of the drugs under s 6 of the Act and a sentence of 15 years' imprisonment and whipping of ten strokes under s 39A(2). The public prosecutor now appeals to this court for confirmation of the conviction and sentence of the High Court.

[2] The respondent was arrested in a raid on 17 September 1997 at about 10.15pm by a party of customs officers, led by Raja Abdul Aziz (PW4), on house No 35, Jalan Sekoi, Bandar Baru Uda, Johor Bahru. The raid was actually on an extension of the main house. The extension had its own single entrance and was rented by the respondent from the owner of the main house. The respondent occupied one room of the extension. There was another room adjoining the respondent's room. Whenever we make mention of the house after this, we mean the extension.

[3] At the time of the raid the respondent was in his room with two other persons, who were to be witnesses for the prosecution. They were Rahmat bin Md Munasir (PW7) and Najib bin Mohd Amin (PW8). From outside the house Raja Aziz saw them smoking what he suspected to be cannabis. Rahmat and Najib confirmed in evidence that the three of them were smoking cannabis. According to Najib, he had gone to the house to collect from the respondent money for a handphone that he had sold to the respondent, and to buy a packet of cannabis, which he did for RM10.

[4] After Raja Aziz was admitted into the house, the respondent made several statements in answer to certain questions from Raja Aziz. A trial-within-a-trial was conducted to determine the admissibility of these statements, which resulted in a finding of admissibility. The facts that we are going to relate are from Raja Aziz's examination in the trial proper.

[5] It was the respondent who came and opened the door of the house in response to Raja Aziz's knocks. In the hall or guest area, Raja Aziz asked the respondent a question, which was duly answered. Then Rahmat and Najib came out of the respondent's room to the hall or guest area. A body search was conducted on the three, and a packet of cannabis was found in a sling-bag which Najib had on him. Raja Aziz directed the respondent to go to his room which Raja Aziz intended to examine. On the floor of the room Raja Aziz noticed a plastic film case containing what proved to be cannabis. Rahmat and Najib were to testify that the cannabis that they and the respondent had been smoking was from that film case. After the finding of the film case, Raja Aziz administered to the respondent the caution under s 37A of the Act, and the respondent was handcuffed.

[6] Raja Aziz then asked the respondent the whereabouts of any other cannabis. At first the respondent was silent, but when asked again he said that it was under the bed (*ada di bawah katil*). Raja Aziz saw several bags under the bed, and understood that the respondent meant it was in one or more of the bags. The respondent's handcuffs were then removed to enable him to bring out the bags that he meant. The respondent brought out three bags from under the bed, which Raja Aziz examined. In a red *Umbro* bag, among the respondent's personal effects, was half a slab of what proved to be cannabis. In a *Slazenger* bag, among the respondent's personal effects, was a slab of what proved to be cannabis. In a green bag were two slabs of what proved to be cannabis.

[7] The total weight of cannabis in the three and a half slabs and in the plastic film case was 3,121g, the amount in the charge, the amount in the film case being only 8.2685g.

[8] After the discovery of the drugs in the respondent's room, he made two more statements in answer to two questions from Raja Aziz.

[9] In the room adjoining the respondent's room were found 22 slabs of cannabis totalling in weight 17,156g. This was not the subject of the charge against the respondent. That room had been occupied by one Ibrahim, nicknamed Boy, before the raid.

[10] On 21 September 1999 the respondent made a statement to the police, which was formally recorded (P29). It was admitted in evidence after a trial-within-a-trial to determine its admissibility, but it would appear to have been an unnecessary piece of evidence because the learned trial judge did not have recourse to it at all in making his findings against the respondent.

[11] The essential and basic finding of the learned trial judge was that the respondent was in possession of the drugs the subject of the charge — that is to say, that he had custody or control of them and knowledge of what they were — and therefore, by reason of their amount, he was presumed under s 37(da)(vi) to be trafficking in them. Throughout his judgment, the learned trial judge qualified the possession that he found with the word 'exclusive'. This was inappropriate and unnecessary, as we shall explain later.

[12] The learned trial judge also found that trafficking of drugs was going on at the house. Apart from the fact that Najib bought of the respondent a packet of cannabis and that Najib and Rahmat were smoking cannabis with the respondent, supplied by the respondent from the film case, the finding of trafficking was made in reliance on evidence of the finding in the respondent's room of paraphernalia for packing and smoking cannabis and evidence that

there had been a heavy traffic of youths going in and out of the house between 7.30pm and 12.30am on the four days before the raid during which the house was under surveillance. In connection with the finding of trafficking, the judge cited the definition of 'trafficking' in s 2 of the Act, which encompasses various acts which constitute actual trafficking as distinguished from trafficking by presumption from the amount of drug, but he did not state which of the acts would be applicable in this case and it is clear from a reading of the judgment as a whole that, in speaking of trafficking, the learned trial judge was not making a specific finding of actual trafficking by the respondent, besides a finding of trafficking by presumption, of the drugs in the charge, but was merely saying, as it were, that the house was a centre of drug-dispensing and drug-consuming activities involving the respondent, and that the use that the learned trial judge made of this was as a reinforcement of the evidence of knowledge on the part of the respondent of the existence and nature of the drugs in the charge, particularly those in the three bags, that is required to render the respondent to be in possession of them, or the judge was merely saying, as it were, that it could be no mere coincidence that a man from whose house such activities were going on was found to have a large amount of drugs in bags kept under his bed.

[13] The evidence of knowledge as found by the learned trial judge, that was reinforced by the evidence of trafficking activities, comprised the facts that the drugs were of a large amount, that they were found in the respondent's room and that the respondent told Raja Aziz that they were under the bed, which is the only one of the respondent's oral statements that the appellant relies on in this appeal.

[14] The respondent's defence was that he had no knowledge of the presence of the cannabis in his room and therefore in law he was not in possession of it. He sought to establish his defence by relying on or resorting to evidence to show that Boy was still in occupation of the other room at the time of the raid and that another person, known as Razali or Botak, had a set of keys of the house and therefore had access to it and to the respondent's room.

[15] The question of others having access to the respondent's room was considered by the learned trial judge both after the close of the case for the prosecution and in evaluating the case after hearing the defence. The learned trial judge said that the matter of access by others was 'to negative the proof of exclusive possession'. Before us the respondent's counsel was candid enough as to what the respondent's aim was in seeking to show the probability of access by others as a matter negativing exclusive possession: it was to assert that the cannabis in the three bags under the bed could have been concealed or planted there by these other persons. The learned trial

judge did not allow himself to be distracted by this suggestion of access by others from the evidence that he found to exist of 'exclusive' possession of the cannabis on the part of the respondent. He did, nevertheless, make findings on the evidence relating to access by others. He found on the evidence that Boy had already ceased living at the house when it was raided. As regards Razali, he found there was no evidence that Razali had a set of the keys of the house although there was evidence that Razali had been entering the house to care for a hamster that was in a cage in the common or guest area.

[16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about 'exclusive' possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, — that is, 'exclusive' — that a conviction is possible. When the learned trial judge said 'The accused sought to negative the proof of exclusive possession...', we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.

[17] The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] MLJ 28:

> ... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
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> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions

[18] Thomson J in *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237, said that 'possession' for the purposes of criminal law involves possession itself — which some authorities term 'custody' or 'control' — and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th Ed), at p 304), in which the exclusive element mentioned by Taylor J appears:

A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

[20] Coming now to the Court of Appeal, they made decisions in three respects. First, they ruled that the respondent's statement recorded in exh P29 was inadmissible. But the admissibility of the statement is irrelevant in this appeal because the learned trial judge, as we have said, did not rely on it and because in this appeal the appellant is not relying on it.

[21] Secondly, the Court of Appeal took the view 'that exclusive possession has not been proven as there is a gap in the case for the prosecution'. That view was taken in consequence of their finding that the prosecution had failed to exclude the possibility that Boy and Razali had access to the house and the respondent's room. That finding was made after noting that, on the facts and the evidence, the learned trial judge was wrong in his reasons for concluding that Boy had ceased to live at the house when the raid took place, and that the prosecution failed to call Boy and Razali as witnesses or offer them to the defence. Like the learned trial judge, the Court of Appeal also qualified possession by the word 'exclusive'. When the Court of Appeal said that 'exclusive possession has not been proven' we take it that they meant no more than that the prosecution had failed to exclude the probability of the cannabis being placed in the respondent's bag by someone else without his knowledge and therefore of his being innocent of possession of the cannabis.

[22] Thirdly, the Court of Appeal felt that the learned trial judge should have treated Najib's evidence about buying cannabis from the respondent with caution and should have considered possible motives for the evidence since Najib and Rahmat were also arrested as suspects, although subsequently released.

[23] The decisions in those three respects constituted the Court of Appeal's reasons for allowing the respondent's appeal. The main reason was the second, which, put simply, is that, on the evidence, someone, other than the respondent, whether Boy or Razali or someone else, could have concealed or planted the drugs in the respondent's bags. It will be seen that the Court of Appeal did not at all deal with the learned trial judge's basic finding of

possession, that is, of custody and knowledge, and his reasons for that finding, especially for the finding as to knowledge. Although the Court of Appeal did, in the third respect, remark on Najib's evidence about buying cannabis from the respondent, that, as we said, was part of the evidence of drug activities that the learned trial judge used to reinforce other circumstances that already proved knowledge, including the respondent's statement that the cannabis was under the bed. The Court of Appeal did not consider those other circumstances proving knowledge.

[24] The appellant's primary aim in this appeal has been to show that, on the evidence, the respondent was in possession of the cannabis in his bags, that is, that he was in custody of the cannabis and had knowledge of its presence, and that, therefore, by reason of the amount, he was to be presumed to be trafficking in the cannabis, and that, that being the case, it was irrelevant to entertain the theory that someone else had access to the respondent's room and placed the cannabis in his bags without his knowledge.

[25] In this appeal the respondent's counsel submitted against the learned trial judge's reasons for admitting, after the trial-within-a-trial, the respondent's oral statements made to Raja Aziz on the night of the raid, which includes the statement that the rest of the cannabis was under the bed. The submission questioned the veracity of Raja Aziz's evidence on the ground of certain perceived inconsistencies in the narrative of events between his evidence in the trial proper and his evidence in the trial-within-a-trial; sought to create doubt as to whether the required caution was administered; and questioned the voluntariness of the statements. We are not persuaded by the submission to hold that the statements were improperly admitted. In our judgment, they were. The statement about the cannabis being under the bed meant that the respondent knew of the existence of the cannabis in his bags. The learned trial judge was therefore right in finding that the respondent was in possession of the cannabis. We will go a step further and say that, even were the respondent's statement to be overlooked, the fact that the respondent, in the circumstances that obtained, brought out from under the bed the bags containing the cannabis was itself sufficient as complete and direct proof that he had knowledge of the existence of the cannabis in the bags and was therefore in possession of it. With such proof of knowledge, it is unavailing as a defence to suggest that the presence of the cannabis in the respondent's bags was the result, unknown to the respondent, of the work of someone who had access to the house and the respondent's room.

[26] We therefore allow the appeal, set aside the orders of the Court of Appeal, and confirm the conviction and sentence of the High Court.

Appeal allowed. Conviction and sentence of High Court affirmed.

Reported by K Nesan